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# STATE OF ARKANSAS

Office of the Attorney General

May 2, 1997

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The Honorable William F. Caton, Secretary  
Federal Communications Commission  
1919 M. Street, N.W.  
Washington, D.C. 20554

RE: In the Matter of )  
 )  
American Communications Services, Inc.'s )  
Petition for Expedited Declaratory Ruling ) CC Docket No. 97-100  
Preempting Arkansas Public Service Commission )  
Pursuant to Section 252(e)(5) of the )  
Communications Act of 1934, as amended )

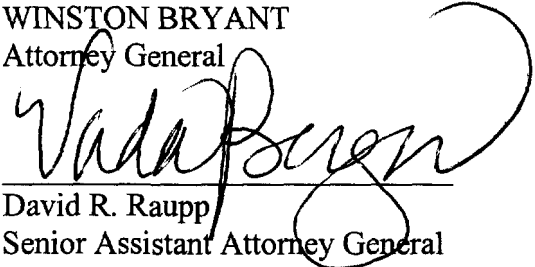
Dear Mr. Caton:

I enclose for filing the original and twelve (12) copies of the Comments of the Arkansas Attorney General in the above-captioned matter.

I enclose an extra copy which I request be marked "Filed" and returned to the Arkansas Attorney General's Office in the enclosed, self-addressed, postage prepaid envelope. Thank you for your assistance and cooperation in the handling of this matter.

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Attorney General

By:

  
David R. Raupp  
Senior Assistant Attorney General

Vada Berger  
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on  
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American Communications Services, Inc.'s  
Petition for Expedited Declaratory Ruling  
Preempting Arkansas Public Service Commission  
Pursuant to Section 252(e)(5) of the  
Communications Act of 1934, as amended

Comments of the Arkansas Attorney General

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## TABLE OF CONTENTS

	PAGE
I. Summary.....	1
II. Background .....	2
A. The 1996 Act.....	2
B. Arkansas Telecommunications Regulatory Reform Act of 1997 .....	4
C. The ACSI-SWBT Interconnection Agreement .....	7
III. ACSI Has Not Identified A Sufficient Controversy Or Uncertainty For Issuance Of A Declaratory Ruling .....	7
A. Standing .....	8
B. Ripeness .....	11
IV. The Commission Should Not Preempt The Arkansas PSC's Ability To Arbitrate And Approve Interconnection Agreements And Determine Eligible Telecommunications Carriers .....	13
A. Preemption Is Not Warranted Under § 252(e)(5).....	14
B. Preemption Is Not Warranted Under § 253(d) .....	15
C. Principles of Federalism Dictate Against Preemption .....	18
V. Conclusion .....	20

## I. Summary

The Telecommunications Act of 1996<sup>1</sup> (1996 Act) is a landmark statute that, for the first time, requires local telecommunications carriers to open their networks to competition and imposes obligations on incumbent local exchange carriers (LECs) to negotiate in good faith with would-be competitors over terms for interconnecting their respective networks, unbundling network elements, and reselling telecommunications services. In response to the 1996 Act, the Arkansas General Assembly passed the Arkansas Telecommunications Regulatory Reform Act of 1997<sup>2</sup> (Act 77), the express purpose of which is to “implement[] the national policy of opening the telecommunications market to competition on fair and equal terms, modif[y] outdated regulation, eliminate[ ] unnecessary regulation, and preserve[ ] and advance[ ] universal service.”<sup>3</sup>

American Communications Services, Inc. (ACSI) contends that Act 77 impedes the opening of telecommunications markets “by directing the Arkansas Public Service Commission (Arkansas PSC) to do no more, approve no more, and permit no more than is expressly mandated by Congress and the [Commission].”<sup>4</sup> In particular, ACSI alleges that Act 77 undermines universal service reform and prohibits the Arkansas PSC from ordering interconnection or unbundling beyond that already mandated by the Commission. Thus, ACSI has filed a petition seeking a declaratory ruling from the Commission preempting the authority of the Arkansas PSC

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<sup>1</sup>Pub. L. No. 104-104, 110 Stat. 56.

<sup>2</sup>1997 Ark. Acts 77, effective February 4, 1997.

<sup>3</sup>1997 Ark. Acts 77, § 2(1).

<sup>4</sup>Petition for Declaratory Ruling, at ii.

to arbitrate and approve interconnection agreements and to determine whether competitive local exchange carriers (CLECs) qualify to receive universal service funds.

Contrary to ACSI's contentions, preemption is not warranted for several reasons. First, ACSI lacks standing to challenge Act 77 because it has not demonstrated that it has been injured by the Arkansas PSC's application of Act 77. Second, ACSI's claims are not ripe because there is no arbitration proceeding or interconnection agreement involving ACSI that is currently pending before the Arkansas PSC, nor has ACSI been denied any universal service funds. Finally, ACSI has failed to demonstrate that the statutory requirements for preemption pursuant to §§ 252(e)(5) and 253(d) of the 1996 Act have been satisfied. Consistently with its duty to maintain and defend the interests of the State, the Attorney General respectfully submits these comments and requests the Commission to decline to exercise its discretion to issue a declaratory ruling preempting the authority of the Arkansas PSC.

## II. Background

### A. The 1996 Act

Congress enacted the 1996 Act to open all telecommunications markets, including local exchanges, to competition. To achieve this goal, the 1996 Act requires LECs to make available certain telecommunications services to competing carriers.<sup>5</sup> The 1996 Act imposes additional duties on incumbent LECs to provide services such as interconnection and access to unbundled network elements (UNEs) because these services will allow telecommunications carriers to enter local markets.<sup>6</sup>

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<sup>5</sup>47 U.S.C. § 251(b).

<sup>6</sup>Id. at § 251(c)(2)-(3).

The 1996 Act also provides procedures for resolving disputes between carriers over the provision of telecommunications services. Under § 252(a)(1), an incumbent LEC and a requesting carrier may negotiate and enter into a binding agreement regarding the terms for services. If the carriers cannot reach a voluntary agreement, either party may petition their state commission to arbitrate any open issues.<sup>7</sup>

Under the 1996 Act, state commissions play an important role in regulating agreements for the provision of telecommunications services. All agreements adopted through either negotiation or arbitration must be submitted to the state commission for approval.<sup>8</sup> The state commission may reject a negotiated agreement only if it finds (1) that the agreement “discriminates against a telecommunications carrier not a party to the agreement[ ]” or (2) that the implementation of the agreement “is not consistent with the public interest, convenience, and necessity[.]”<sup>9</sup> The state commission may reject an arbitrated agreement if it finds that the agreement does not meet the requirements of § 251.<sup>10</sup>

Finally, the 1996 Act allows the Commission to preempt the duties of a state commission in only two circumstances. First, if a state commission fails to carry out its responsibility to approve agreements under § 252, the Commission “shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter” and shall assume the responsibility of the state commission.<sup>11</sup> Second, § 253 allows the Commission to preempt a state commission in

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<sup>7</sup>Id. at § 252(b).

<sup>8</sup>Id. at § 252(e).

<sup>9</sup>Id. at §§ 252(e)(2)(A)(i)-(ii).

<sup>10</sup>Id. at § 252(e)(2)(B).

<sup>11</sup>Id. at § 252(e)(5).

order to remove barriers to entry into the telecommunications market. If the Commission determines that a state or local government has imposed a requirement that presents a barrier to entry, the Commission, pursuant to § 253(d), “shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”

Although the 1996 Act represents a comprehensive revision of the Communications Act of 1934, it also makes clear that the states retain a significant degree of authority to enact legislation and adopt regulations affecting the provision of intrastate telecommunication services. For instance, the 1996 Act provides that § 253 shall not be construed to “affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254 [of the 1996 Act], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”<sup>12</sup> Moreover, in promulgating regulations to implement § 251, the Commission is prohibited from precluding the enforcement of a state commission order regarding access and interconnection obligations if the order is consistent with, and does not substantially prevent, implementation of § 251’s requirements.<sup>13</sup> Finally, § 254(f) authorizes states to “adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.”

B. Arkansas Telecommunications Regulatory Reform Act of 1997

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<sup>12</sup>Id. at § 253(b).

<sup>13</sup>Id. at § 251(d)(3); see also In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (1996), at ¶ 119 (hereinafter “Local Competition Order”).



Act 77 represents a legitimate exercise of Arkansas' authority under § 253(b) of the 1996 Act to "protect the public safety and welfare" and to ensure the continued provision of high-quality intrastate telecommunications services consistent with the public interest. Contrary to ACSI's contentions, Act 77 demonstrates the Arkansas General Assembly's intent to promote the provision of telecommunications services in accordance with the 1996 Act. For example, § 2(1) of Act 77 notes that the General Assembly intended to "[p]rovide for a system of regulation of telecommunications services, consistent with the [Communications Act of 1934, as amended by the 1996 Act] that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms, modifies outdated regulation, eliminates unnecessary regulation, and preserves and advances universal service." Similarly, Act 77's Emergency Clause states that "[i]t is essential that the State of Arkansas immediately revise its regulatory regime for the telecommunications industry to ensure that it is consistent with and complementary to the Federal Telecommunications Act of 1996."

Accordingly, Act 77 requires carriers to make available certain telecommunications services as provided for in the 1996 Act. For example, § 9(f) states that

[a]s provided in Sections 251 and 252 of the [1996 Act], the [Arkansas PSC's] authority with respect to interconnection, resale, and unbundling, is limited to the terms, conditions, and agreements pursuant to which an incumbent local exchange carrier will provide interconnection, resale, or unbundling to a CLEC for the purpose of the CLEC competing with the incumbent local exchange carrier....

In addition, § 9(g) provides that the Arkansas PSC shall approve resale restrictions to the extent permitted by the 1996 Act.

As contemplated by the 1996 Act, Act 77 also requires the Arkansas PSC to participate in agreements between carriers for the provision of telecommunications services. Section 9(i) states

that the Arkansas PSC “shall approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the [1996 Act] unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of Section 251 of the [1996 Act].”

Consistent with the federal intent to preserve universal service, Act 77 also established the Arkansas Universal Service Fund (AUSF) “to promote and assure the availability of universal service at rates that are reasonable and affordable, and to provide for reasonably comparable services and rates between rural and urban areas.”<sup>14</sup> Thus, § 4(b) requires that all telecommunications providers, except as prohibited by federal law, shall be charged “for the direct and indirect value inherent in the obtaining and preserving of reasonable and comparable access to telecommunications services in the rural or high cost areas.”

Act 77 also follows the 1996 Act to determine the eligibility of carriers to receive AUSF funds. For instance, § 5(b) authorizes the Arkansas PSC to designate telecommunications providers in addition to the incumbent LEC as eligible for high-cost support, so long as its designations are consistent with the provisions of § 214(e)(2) of the 1996 Act. Section 5(c) also permits the Arkansas PSC to allow a provider to relinquish its designation of eligibility, so long as its relinquishment is consistent with the requirements of § 214(e)(4) of the 1996 Act.

Other provisions of Act 77 also properly take into account the supremacy of federal law. For example, § 10(a) provides that rural telephone companies are not obligated to negotiate or to conclude interconnection agreements with other telecommunications providers to the extent provided by §§ 251(c) and 252 of the 1996 Act. Finally, in § 11(d) of Act 77, the General

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<sup>14</sup>1997 Ark. Acts 77, § 4(a).

Assembly directed the Arkansas PSC to conduct a rulemaking “to identify and repeal all rules and regulations relating to the provision of telecommunications service which are inconsistent with, have been rendered unnecessary by, or have been superseded” by either Act 77 or the Communications Act of 1934, as amended by the 1996 Act.

C. The ACSI-SWBT Interconnection Agreement

ACSI is a CLEC that provides integrated local voice and data communications services. According to its Petition, ACSI already has negotiated and arbitrated an interconnection agreement with Southwestern Bell Telephone Company (SWBT) pursuant to §§ 251 and 252 of the 1996 Act.<sup>15</sup> The Arkansas PSC approved the agreement in Orders No. 2 and 4 in Docket No. 96-258-U, finding that the agreement did not discriminate against non-party telecommunications carriers and was not against the public interest.<sup>16</sup> Thus, ACSI has successfully interconnected with SWBT, and its digital SONET-based fiber optic network in Little Rock, Arkansas, is currently operational.<sup>17</sup> The ACSI-SWBT interconnection agreement expires and will be subject to renegotiation in 1998.

III. ACSI Has Not Identified A Sufficient Controversy Or Uncertainty For Issuance Of A Declaratory Ruling.

Pursuant to its regulations, as well as by statutory authority, the Commission has discretionary authority to issue the declaratory ruling ACSI seeks in order to terminate a

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<sup>15</sup>Petition for Declaratory Ruling, at 3.

<sup>16</sup>In re SWBT’s Application for Approval of Interconnection Agreement Under the Telecommunications Act of 1996 with American Communications Services of Little Rock, Inc. Docket No. 96-258-U. Order No. 2 was approved on October 18, 1996, and Order No. 4 was approved on December 10, 1996.

<sup>17</sup>Petition for Declaratory Ruling, at 3.

controversy or to remove uncertainty.<sup>18</sup> Although the concepts of standing and ripeness are not directly applicable to declaratory rulings issued by agencies,<sup>19</sup> the Commission has relied upon those concepts to determine whether a sufficient controversy or uncertainty exists to warrant issuance of a declaratory ruling.<sup>20</sup> ACSI does not have standing, nor are its claims ripe. Consequently, the Commission should decline to exercise its discretion to issue a declaratory ruling.

#### A. Standing

In order to be entitled to a declaratory ruling, consistently with federal courts' analysis of standing, ACSI must show that it has suffered an "injury in fact" traceable to Act 77 which is redressable by the relief it requests.<sup>21</sup> An "injury in fact," in turn, consists of a legally protected interest which is concrete and particularized as well as actual or imminent, not conjectural or hypothetical.<sup>22</sup> As this definition of "injury in fact" makes clear, "speculative allegations of future injuries"<sup>23</sup> or an "hypothesized [chain of events] which . . . eventually leads to actual injury[ ]"<sup>24</sup> do not confer standing.

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<sup>18</sup>47 C.F.R. § 1.2; 5 U.S.C. § 554(e).

<sup>19</sup>See Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154, 1161 (D.C. Cir. 1995).

<sup>20</sup>Omnipoint Communications, Inc., 11 FCC Rcd. 10785, 10788-89 (1996).

<sup>21</sup>E.g., Animal League Defense Fund, Inc. v. Espy, 23 F.3d 496, 498 (D.C. Cir. 1994).

<sup>22</sup>E.g., Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718, 723 (D. C. Cir. 1996).

<sup>23</sup>United Transportation Union v. ICC, 891 F.2d 908, 912 (D.C. Cir. 1989), cert. denied, 497 U.S. 1024 (1990).

<sup>24</sup>Northwest Airlines, Inc. v. FAA, 795 F.2d 195, 201 (D.C. Cir. 1986).

ACSI has only speculated about future injuries and hypothesized about a chain of events concerning the Arkansas PSC's application of Act 77. ACSI does not allege that it has either negotiated or arbitrated an interconnection agreement upon which the Arkansas PSC has failed to act since the passage of Act 77, much less in a manner which has harmed it. The Arkansas PSC has already approved one interconnection agreement between SWBT and ACSI, and ACSI has not alleged that the Arkansas PSC failed to act with respect to that agreement. ACSI may not even need the Arkansas PSC to arbitrate the renewal of this agreement in 1998. Nor has ACSI alleged that any provisions of Act 77 have prohibited it or had the effect of prohibiting it from providing any intrastate telecommunications services. Rather, ACSI contends that it might be injured in the future by claiming that it "has grave concerns about its ability to obtain a satisfactory renewal of its interconnection agreement[ ]"<sup>25</sup> and that it will be effectively disqualified from receiving universal service funding from the State which, in turn, will place it at a significant competitive disadvantage.<sup>26</sup> The Commission should not issue a declaratory ruling based upon what might happen to ACSI.

Not only has ACSI not been injured by any of the Arkansas PSC's actions since passage of Act 77, but the injuries it fears are not imminent or even likely to happen. As previously explained, Act 77 contains numerous provisions which require the Arkansas PSC to act in accordance with the requirements of the 1996 Act.<sup>27</sup> Consequently, in order to thwart the aims of the 1996 Act in a manner which would harm ACSI, the Arkansas PSC would have to ignore not

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<sup>25</sup>Petition for Declaratory Ruling, at 3.

<sup>26</sup>Id.

<sup>27</sup>E.g., 1997 Ark. Acts 77, §§ 5(b), 9(f), 9(g).

only the requirements of federal law, but also the requirements of Act 77. The Commission should reject ACSI's request to assume that the Arkansas PSC will ignore its statutory mandates.

In practice, Act 77 has not thwarted the goals of the 1996 Act or caused the Arkansas PSC to act in ways that would harm the development of local exchange competition. One of ACSI's allegations, for example, is that Act 77 will prevent it from obtaining UNEs beyond those already approved by the Commission in the Local Competition Order.<sup>28</sup> In one of the most significant interconnection arbitrations resolved by the Arkansas PSC since Act 77's passage – the AT&T Arbitration<sup>29</sup> – the Arkansas PSC directed SWBT to make available to AT&T unused transmission media,<sup>30</sup> even though the Commission has not specifically directed incumbent LECs to provide such unused transmission media on an unbundled basis.<sup>31</sup> In addition, rather than relying on the provisions of Act 77 to refuse to require SWBT to provide for subloop unbundling – unbundling specifically left to the states by the Commission<sup>32</sup> – the Arkansas PSC relied instead on the record evidence introduced by SWBT that it was “not technically feasible to provide the subloop unbundling requested by AT&T and that further unbundling could damage the integrity of the network.”<sup>33</sup>

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<sup>28</sup>Petition for Declaratory Ruling, at 10-12.

<sup>29</sup>See In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to § 252(b) of the Telecommunications Act of 1996, Docket No. 96-395-U, Order No. 6 issued on March 11, 1997, adopting Order No. 5 issued on February 28, 1997 (hereinafter “AT&T Arbitration”).

<sup>30</sup>Id., Order No. 5, at 25-28.

<sup>31</sup>Local Competition Order, at ¶ 366; see also 47 C.F.R. § 51.319.

<sup>32</sup>Local Competition Order, at ¶ 391.

<sup>33</sup>AT&T Arbitration, Order No. 5, at 24.

In short, there is no actual or real likelihood that Act 77 will be applied to restrict or limit ACSI's federally protected interests. Furthermore, there does not appear to be any sound basis for suggesting that the Arkansas PSC is not prepared to fulfill its role in the development of telecommunications competition. From the foregoing, it is clear that ACSI has not suffered an "injury in fact" as a result of the passage of Act 77. Its claims of harm or injury are purely hypothetical and, based on the recent actions of the Arkansas PSC in the AT&T Arbitration, are not likely to occur. Consequently, ACSI lacks standing to challenge Act 77, and the Commission should decline to issue a declaratory ruling on this basis alone.

B. Ripeness

Ripeness is analogous to standing in that it requires ACSI to demonstrate that it has "an injury in fact."<sup>34</sup> In addition, however, ripeness also involves consideration of whether the issues are fit for decision, including whether they are sufficiently concrete<sup>35</sup> and whether issuing a ruling would embroil the decisionmaker in abstract disagreements, particularly when other governmental entities are involved.<sup>36</sup> When these ripeness concerns are considered, they dictate the conclusion that ACSI's petition for a declaratory ruling presents issues which are not ripe for decision.

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<sup>34</sup>E.g., DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 297 (D.C. Cir. 1989).

<sup>35</sup>E.g., Mississippi Valley Gas Co. v. FERC, 68 F.3d 503, 508 (D.C. Cir. 1995).

<sup>36</sup>E.g., Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996).

ACSI has asked the Commission to issue a declaratory ruling preempting the Arkansas PSC's ability to arbitrate and approve any interconnection agreements pursuant to 47 U.S.C. § 252(e)(5).<sup>37</sup> Section 252(e)(5) provides as follows:

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(emphasis supplied). In contrast to what ACSI proposes, § 252(e)(5) does not authorize the Commission to preempt the ability of state commissions to approve and arbitrate interconnection agreements wholesale, but instead limits that preemption to specific matters or proceedings in which the commissions have failed to act. In that respect, § 252(e)(5) contains its own ripeness limitation – preemption is authorized only when there is an existing arbitration and agreement at stake for which the issues are concrete.

The Commission's own interpretation of § 252(e)(5) is consistent with this understanding. The Commission has stated that it “will not take an expansive view of what constitutes a state's ‘failure to act[ ]’” and will only preempt a state commission when presented with a concrete factual situation.<sup>38</sup> Because ACSI has not identified any particular arbitration or agreement upon which the Arkansas PSC has failed to act, its request for preemption pursuant to § 252(e)(5) is not ripe.

ACSI's remaining preemption requests are similarly not ripe for decision by the Commission. In addition to requesting preemption pursuant to § 252(e)(5), ACSI has asked the

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<sup>37</sup>Petition for Declaratory Ruling, at 1, 14-15.

<sup>38</sup>Local Competition Order, at ¶¶ 1285, 1287-88.



Commission to preempt, pursuant to 47 U.S.C. § 253(d), the Arkansas PSC's ability to arbitrate and approve interconnection agreements and its ability to determine whether CLECs qualify to receive universal service funding.<sup>39</sup> In pertinent part, § 253(d) empowers the Commission to preempt the enforcement of state statutes which prohibit or have the effect of prohibiting any entity from providing intrastate telecommunications service. ACSI has not alleged, much less demonstrated, that a current controversy exists concerning its ability to negotiate an interconnection agreement or its qualifications for universal service funding under Act 77.<sup>40</sup> Perhaps more importantly, ACSI also has not demonstrated that Act 77 has prohibited it in any manner from providing intrastate telecommunications service. ACSI's preemption claims based upon § 253(d) are not ripe for a declaratory ruling.

IV. The Commission Should Not Preempt The Arkansas PSC's Ability To Arbitrate And Approve Interconnection Agreements And Determine Eligible Telecommunications Carriers.

ACSI argues that various provisions of Act 77 "prohibit[ ] the competitive provision of certain telecommunications services[ ]" and "afford[ ] incumbent LECs an insuperable advantage in competing to provide local services in the affected areas."<sup>41</sup> ACSI therefore requests the Commission, pursuant to §§ 252(e)(5) and 253(d) of the 1996 Act, to preempt the Arkansas PSC's ability to arbitrate and approve interconnection agreements and its ability to determine what carriers will be eligible for universal service funding.<sup>42</sup> Its request should be denied.

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<sup>39</sup>Petition for Declaratory Ruling, at 15, 19.

<sup>40</sup>There is no reason to believe that ACSI will not qualify to receive Arkansas universal service funding. See Section IV.A, infra.

<sup>41</sup>Petition for Declaratory Ruling, at 15, 19.

<sup>42</sup>Id. at 19.

A. Preemption Is Not Warranted Under § 252(e)(5).

Section 252(e)(5) of the 1996 Act authorizes the Commission to preempt a “State commission’s jurisdiction of [a] proceeding or matter” if the state commission fails to carry out its responsibility under § 252. While ACSI suggests that this section would apply to a situation in which a state commission is allegedly “*constructively*” prevented by state law from fulfilling its “critical function under the Communications Act[ ]” in promoting the development of competition,<sup>43</sup> it is clear that Section 252(e)(5) was not meant to apply to such a situation. In the Local Competition Order, the Commission states that § 252(e)(5) applies only “to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).”<sup>44</sup>

In its Petition, ACSI has neither alleged nor proved that the Arkansas PSC has failed to carry out its responsibilities under § 252 of the 1996 Act. To the contrary, ACSI suggests that it does not request preemption under § 252(e)(5) “because [the Arkansas PSC] has failed to act within a reasonable period – but because it cannot act at all within the meaning of the Communications Act.”<sup>45</sup> This allegation, however, is directly refuted by the facts that ACSI is interconnected with SWBT pursuant to an agreement approved by the Arkansas PSC in compliance with the 1996 Act<sup>46</sup> and that the Arkansas PSC has successfully arbitrated interconnection agreements, such as the AT&T and SWBT agreement, after passage of Act 77. Moreover, this allegation conflicts with the clear tenor of Act 77, which directs the Arkansas

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<sup>43</sup> Id. at 9.

<sup>44</sup> Local Competition Order, at ¶ 1285 (footnote omitted).

<sup>45</sup> Petition for Declaratory Ruling, at 15.

<sup>46</sup> See supra note 16.

PSC to supervise and monitor the development of competition in Arkansas and to ensure that this competition proceeds consistently and in parallel with the development of competition for interstate services.<sup>47</sup> In short, there is no basis for preemption under § 252(e)(5).

B. Preemption Is Not Warranted Under § 253(d).

Section 253(d) of the 1996 Act authorizes the Commission to preempt the enforcement of any state statute, regulation, or legal requirement which violates subsection (a) of § 253. Subsection (a), in turn, provides that no state statute “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” According to ACSI, preemption of the Arkansas PSC’s ability to arbitrate and approve interconnection agreements is justified in this instance because Act 77 “denies ACSI and other competitors the ability to obtain PSC directives mandating incumbent LEC fulfillment of bona fide requests for facilities needed to provide competitive services.”<sup>48</sup> By arguably limiting the availability of UNEs, ACSI further contends that Act 77 “has the effect of prohibiting the competitive provision of certain telecommunications services.”<sup>49</sup>

Act 77 does not preclude ACSI from providing any intrastate telecommunications service. Nothing in either Act 77 or the AT&T Arbitration suggests that the Arkansas PSC will apply Act 77 in such a manner as to prevent ACSI from providing any intrastate service in competition with any incumbent LEC. Moreover, as previously stated, it does not appear likely that Act 77 will be even utilized by the Arkansas PSC to refuse to authorize UNEs in addition to

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<sup>47</sup>1997 Ark. Acts 77, § 2(1).

<sup>48</sup>Petition for Declaratory Ruling, at 15.

<sup>49</sup>Id.

those previously authorized by the Commission in the Local Competition Order and incorporated into 47 C.F.R. § 51.319.

Even if there were evidence that the Arkansas PSC has failed to require any unbundling of network elements, ACSI's request for preemption is too broad. ACSI never explains, much less presents any evidence, as to why or how Act 77 thwarts the Arkansas PSC's authority to approve interconnection agreements after ensuring their compliance with § 251 or to determine that they are consistent with the public interest, convenience, and necessity and do not discriminate against third-party carriers as required by § 252(e)(1)-(2).<sup>50</sup> Yet, ACSI asks the Commission to preempt the Arkansas PSC's authority to perform its approval function as well.

As a party seeking the preemption of a state law, ACSI bears the burden of demonstrating that there is no possible way for Act 77 to be applied without having the effect of prohibiting it from providing any intrastate telecommunications service.<sup>51</sup> Without any factual allegations to support its claims, there is no substantiated conflict between Act 77 and the mandates of federal law. Consequently, the Commission would not be justified in ordering preemption of the Arkansas PSC's ability to arbitrate and approve interconnection agreements pursuant to § 253(d).

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<sup>50</sup> ACSI does claim that Act 77 impedes the Arkansas PSC's ability to determine whether an interconnection agreement discriminates against third-party carriers by prohibiting those carriers from intervening in arbitration proceedings. Petition for Declaratory Ruling, at 5. The prohibition on intervention in arbitration proceedings, however, neither prohibits the PSC from determining whether agreements discriminate against non-party carriers nor conflicts with the 1996 Act. While every interconnection agreement will be reviewed for discrimination, see § 252(e)(2), not every interconnection agreement will be arbitrated. See § 252(a). Moreover, because issues in an arbitration are limited to those raised by the arbitrating parties, see § 252(b)(4)(A), third parties are not free to contest other provisions of an interconnection agreement on the ground that it discriminates against them. Finally, and perhaps more importantly, the Local Competition Order provides that, as a general matter, the Commission also will not allow third parties to participate in arbitrations and will, at most, entertain requests by them to submit written pleadings. Id. at ¶ 1295.

<sup>51</sup> See, e.g., California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987).

Section 253(b) of the 1996 Act provides that a state may adopt requirements necessary “to preserve and advance universal service[ ]” if they are imposed “on a competitively neutral basis and [are] consistent with section 254[(f) of the 1996 Act].” Section 253(d) permits the Commission to preempt the enforcement of any state statute, regulation, or legal requirement which violates or conflicts with § 253(b). ACSI argues that § 5(b) of Act 77 “imposes onerous restrictions on the ability of CLECs such as ACSI to become recipients of universal service funding, in contravention of Section 254(f) of the 1996 Act[.]”<sup>52</sup> Although ACSI acknowledges that the Commission has not yet issued final rules implementing the federal universal service funding program, it nevertheless states that “it is evident that the Arkansas requirements will be inconsistent, because they conflict with the requirements of the 1996 Act itself.”<sup>53</sup>

ACSI’s contentions are baseless. As ACSI concedes, §§ 4 and 5 of Act 77 apply only to the establishment and operation of the Arkansas universal service fund. This contrasts with § 254 of the 1996 Act and the Commission’s anticipated rules which, as conceded by ACSI, apply only to the federal universal service program.<sup>54</sup> Moreover, without the Commission having issued its rules governing universal service funding, it is impossible to determine whether Act 77’s provisions conflict with those rules. And finally, ACSI does not even attempt to explain why it would not be able to qualify for funding under § 5 of Act 77. Indeed, ACSI appears to be eligible for such funds because it already operates a SONET-based fiber optic network in Little Rock.<sup>55</sup> Nor does ACSI attempt to explain how the non-receipt of funds from both the state and

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<sup>52</sup>Petition for Declaratory Ruling, at 16.

<sup>53</sup>Id. at 16-17.

<sup>54</sup>Petition for Declaratory Ruling, at 16.

<sup>55</sup>Id. at 3.

the federal universal service programs prevents it from providing any telecommunications service. Section 253(d) only authorizes preemption if state law violates §§ 253(a) and (b). ACSI has failed to carry its burden of demonstrating that Act 77 and the establishment of the Arkansas universal service fund contravenes the requirements of either subsection.

C. Principles of Federalism Dictate Against Preemption.

While preemption on the statutory grounds advanced by ACSI is neither ripe nor appropriate on the facts before the Commission, and each of those reasons alone support denying the Petition, equally important policy considerations also support denial. Principles of federalism explained in the jurisprudence of the United States Supreme Court, Arkansas' interest in regulating intrastate telecommunications, and the cooperative regulatory goals endorsed by the 1996 Act and the Commission, all counsel against a declaratory ruling preempting Act 77 and actions by the Arkansas PSC.

First, the Supreme Court's preemption jurisprudence has recognized the vital role of states and their agencies in the federal scheme in many contexts, including in telecommunications.<sup>56</sup> Second, Arkansas does have a public interest in regulating intrastate telecommunications to ensure, among other things, service throughout its rural population.<sup>57</sup> Finally, Congress and the Commission continue to embrace a dual regulatory framework under the 1996 Act. To be sure, there can be little (if any) doubt that Congress could choose to

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<sup>56</sup>See, e.g., Louisiana PSC v. FCC, 476 U.S. 355 (1986); cf. BFP v. RTC, 114 S. Ct. 1757, 1764-66 (1994) (bankruptcy; noting where congressional intent to override state law is doubtful, "deference to long established traditions of state regulation[]" appropriate); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516-30 (1992) (state law damages actions); New York v. United States, 505 U.S. 144, 155-69 (1992) (hazardous waste); Gregory v. Ashcroft, 501 U.S. 452, 457-63 (1991) (election of state officials); Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493, 512 (1989) (natural gas).

<sup>57</sup>See 1997 Ark. Acts 77, §§ 2, 16; cf. 47 U.S.C. § 251(f).

exercise plenary authority exclusively to regulate telecommunications under the Commerce and Supremacy Clauses,<sup>58</sup> without invading any state interest protected by the Tenth Amendment or the Guaranty Clause and lying “at the heart of representative government.”<sup>59</sup> Yet, Congress has never chosen to do so.

Instead, since first enacting legislation in the area, Congress has expressly recognized the importance of state interests in intrastate telecommunications and the ability of states to regulate to protect those interests.<sup>60</sup> Indeed, § 152(b)’s express exception of intrastate matters from the Commission’s authority continues to have vitality even under the 1996 Act.<sup>61</sup> The Commission has, of course, echoed Congress’ preference for shared regulatory responsibilities.<sup>62</sup> Arkansas has undertaken to meet its responsibilities by significantly amending its telecommunications law.

ACSI’s petition essentially requests preemption in derogation of Arkansas’ role to promote its intrastate telecommunication interests under a federal statutory and regulatory scheme expressly accommodating that role. ACSI’s characterization of Arkansas’ law ignores that role and its importance in both the federal and state arenas. Whether Congress in the future will entirely eliminate any state’s role or whether Arkansas will in a particular circumstance act

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<sup>58</sup>See Gregory, 501 U.S. at 460; Louisiana, 476 U.S. at 368-69.

<sup>59</sup>Gregory, 501 U.S. at 463 (internal quotation marks omitted).

<sup>60</sup>See, e.g., 47 U.S.C. §§ 152(b), 251(d)(3), 253(b), 254(f), 261(c).

<sup>61</sup>See Iowa Utilities Bd. v. FCC, 109 F.3d 418, 424-25 & n.6 (8th Cir. 1997)(entering temporary stay of pricing and “pick and choose” rules of Local Competition Order); but cf. Classic Telephone, 11 FCC Rcd. 13082, 13094-95 & n.68 (1996)(citing Local Competition Order and noting that the Commission considers the 1996 Act to control), petition for review docketed sub nom. City of Bogue, KS and City of Hill City, KS v. FCC, No. 96-1432 (D.C. Cir. Nov. 22, 1996).

<sup>62</sup>See, e.g., Local Competition Order, at ¶¶ 2, 133.

contrary to overriding federal goals under the 1996 Act cannot be answered at this point. What can be said, however, is that Arkansas has acted within its powers under a federal scheme of telecommunications regulation, and, until a particular circumstance demonstrates otherwise, preemption would contradict the cooperative federal scheme to be implemented by the Commission and state commissions as intended by Congress.<sup>63</sup>

## V. Conclusion

Contrary to ACSI's assertions, preemption of Act 77 is neither mandated by the 1996 Act nor an appropriate exercise of the Commission's discretion. ACSI offers not facts, but only unfounded and conclusory claims of hypothetical harm in support of its request for a declaratory ruling. Such unsubstantiated allegations are not sufficient to confer standing on ACSI or to make its claims ripe. Its petition therefore is premature and should be denied.

ACSI also has failed to demonstrate that the statutory requirements for preemption pursuant to §§ 252(e)(5) and 253(d) of the 1996 Act have been satisfied. ACSI has neither alleged nor proved that the Arkansas PSC has failed to carry out its responsibilities under § 252 of the 1996 Act. Nor has ACSI demonstrated that Act 77 precludes it from providing any intrastate telecommunications service or renders it ineligible to receive universal service funds. Rather, ACSI simply asks the Commission to assume that the Arkansas PSC will fail to fulfill its obligations under both the 1996 Act and Act 77. The Commission should neither make nor rely

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<sup>63</sup>Whether Congress can stop short of exercising its Commerce Clause powers to the fullest and direct state regulation under the guise of cooperative federalism consistently with the Tenth Amendment, *cf. New York*, 505 U.S. at 160-69 (discussing coercive measures Congress may employ) *but cf. Classic Telephone*, 11 FCC Rcd. at 13108 (rejecting Tenth Amendment claim), or whether it has done so by the 1996 Act, are neither questions asked by Arkansas nor ones the Commission need answer to deny ACSI's petition for a declaratory ruling on preemption.

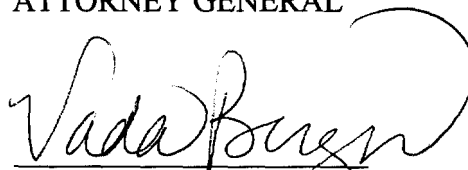


on such unfounded assumptions to preempt the Arkansas PSC's authority to regulate telecommunications in Arkansas. Accordingly, ACSI's petition should be denied in its entirety.

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